No. 2662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. M. NELSON,

Appellant,

vs.

CARL PATSEL, W. SANDSTREN, GUST. JOHNSON, CHAS. NELSON, A. SANDSTRAN, M. W. JOHNSON, PETER JOHNSON, HUGO DUNDGREN, HARRY SWANSON, N. P. JOHNSON, GUST. PETERSON, CHARLES JOHNSON, JOHN ANDERSON, KNUT ANDERSON, A. PETERSON, ALBERT JOHNSON, CARL ANDERSSON, M. NILSSON, JOSEF NILSEN, JOHAN KARLSEN, SIGURD I. NILSON,

Appellees.

BRIEF FOR APPELLANT.

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Proctors for Appellant.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

Appellant was respondent in the court below in an action instituted by fishermen and beachmen for the recovery of the penalties imposed by Section 4568 of the Revised Statutes of the United States because of an alleged failure to provide the scale of provisions set forth in Section 4612 of the Revised Statutes.

The District Court entered a decree in favor of each of the libelants in the sum of sixty-five and 50/100 (65.50) dollars upon the theory that each of them was entitled to the maximum penalty per day for each article of food found to be short. The total of the decree penalized appellant in the sum of thirteen hundred ten and 25/100 (1310.25) dollars. The lower court found that there was a failure to provide water, potatoes or yams, rice, onions, beans and salt pork. This appeal is prosecuted from that decree.

Specifications of Error.

There are seventeen assignments of error (App. p. 194) which attack the decree of the lower court in its findings that the provisions above set forth were not provided, and particularly do they attack the decree in holding that libelants were seamen, and in not holding that appellant was not bound to furnish the scale of provisions set forth in Section 4612 of the Revised Statutes of the United States because of the fact that the libelants were fishermen, sharing in the season's catch, and the vessel upon which they were engaged as such was a fishing vessel.

We also contend that the court erred in its construction of Section 4568 of the Revised Statutes, in that it construed that section to mean that one day's penalty attached to the failure to furnish the specified amount of each article of food, it being appellant's contention that the statute means that for each day's shortage of the allowance specified by the section there shall be a

penalty of not more than fifty cents per day if the shortage is less than one-third of the specified amount, or greater, but not to exceed one dollar per day if the shortage exceeds one-third of the whole amount therein specified.

Argument.

To have this cause submitted in its proper light, we think it material for the court to understand just why a few of the libelants—the ringleaders—persuaded the rest of them to join in the charges contained in the libel now under consideration. Furthermore, we would suggest a perusal of the list of provisions set forth in the invoices of the merchants from whom appellant purchased his supplies, in order that the court may understand that he made every effort to procure wholesome provisions—the best that could be procured at that season of the year.*

In the first place, the appellant employed Swanson, one of the libelants, long before the expedition commenced, for the sole purpose of seeing that all of the provisions necessary for the season were procured. (Nelson, App. pp. 137-141.)

Swanson, in Alaska, was also told to obtain all necessary provisions . (Nelson, App. p. 143.) He thereafter prepared a list of all the provisions required. (Swanson, App. pp. 48-50; Soland, App. p. 149.) All that was ordered by him was furnished except the peas. (Swan-

* The invoices are on file in this court as original exhibits.

son, App. p. 42.) Furthermore, Swanson told the master that he had enough provisions to last for thirty-five days (E. Nelson, App. p. 162; Soland, App. p. 150) and no complaint was made by him about the provisions during the whole voyage home. (Swanson, App. p. 44.)

In this connection it is significant to note that the reason advanced by the cook for his failure to complain to the master about the provisions was because the master could do nothing to help matters. (Swanson, App. p. 44.) How this testimony can be reconciled with his action in discussing and communicating his wants to the master when making up the list of necessary provisions is difficult to understand. (Swanson, App. p. 46.)

It does seem strange that with all this alleged shortage there was no complaint made by the libelants during the entire voyage to this port. When the record is read, however, the motive for the late complaint, which ripened into the present suit, is made clear.

Two or three of the leaders had a bad quarrel with appellant concerning additional wages because of the greater percentage claimed to have been earned by catching fish. So, too, there were quarrels brought about because of the desire of some of the libelants to take fish to San Francisco in barrels. (Patsel, App. p. 119; Swanson, App. p. 41.)

These disgruntled libelants came together after the ship's arrival and persuaded several others to make demand upon appellant for the sum of five hundred (500) dollars, which demand was refused. After the fishermen made this demand, "the beachmen came into the case too." (C. A. Nelson, App. p. 108.)

A general plan was then formulated to get everything possible out of the appellant. The secretary of the fishermen's union thereupon prepared a list of the provisions claimed to have been short (C. A. Nelson, App. p. 109), to which list the witness referred in giving his testimony as to what was and was not provided.

We think that this bitter feeling is manifested throughout the entire record. It is evidenced by such answers as were given by the libelants in response to questions propounded by their proctor. For instance, Swanson, when questioned as to whether he was one of the libelants—the first question asked him—said:

"We were short of food." (Swanson, App. p. 64.)

Charles A. Nelson was asked as to whether or not he had any beans served on the voyage down, to which he most emphatically responded:

"No, sir." (C. A. Nelson, App. p. 104.)

That libelants had no regard for the truth is apparent from that last answer, in view of the testimony of some of the other libelants; for instance, that of Swanson (App. pp. 71-90), that beans were served twice a day upon nearly the whole voyage. Numerous other instances appear throughout the record, but no good purpose would be served by reciting each one of them.

With this setting before the court, we will take up each item found short by the trial court and attempt to point out that, with the exception of the finding of shortage of potatoes, the court erred in entering up the decree against the appellant.

Water:

The trial court found that the sum of fourteen and 50/100 dollars was due each libelant for the failure to provide water. (App. p. 189.)

The water equipment on the "Roy Somers" consisted of first an iron tank holding 1,000 gallons; second, six casks holding 90 gallons each; third, one large cask holding 200 gallons; fourth, the regular water cask that belonged to the schooner, holding 150 gallons; and fifth, four extra large barrels holding at least 50 gallons each. (Swanson, App. pp. 35-36; P. M. Nelson, App. p. 132; E. Nelson, App. pp. 159-160.) It is undisputed that the water equipment on the vessel was as above stated, and that the total quantity of water was 2054 gallons. It is also undisputed that all this cooperage contained the water used on the voyage from San Francisco to Alaska. There was no complaint as to the quantity or quality of water on the voyage to the North. The same cooperage was used on the return voyage now in question.

The testimony is indisputable in showing that just prior to leaving Alaska the cooperage was thoroughly cleansed and then filled with the purest water obtainable. In order to get this water a barge was towed to Nushagak, a place seventy miles distant from that where the schooner lay at anchor. (P. M. Nelson, App. p. 133.) When asked to compare the water at Koggiung with the water at Nushagak, Captain Soland said:

> "The water at Nushagak was the best water we could get. The water that came from Nushagak beat the water we got from Koggiung." (App. pp. 156-157.)

The appellant testified that because he was not satisfied with the water at Koggiung he went to Nushagak, seventy miles distant, where he obtained a full supply of spring water with which he filled the tanks and casks aboard the vessel. He also testified that a small part of the water contained in a few of the casks was intended for washing purposes, and not for drinking or cooking. His testimony, however, is quite convincing that there was a sufficient amount of the best spring water obtainable in Alaska for drinking and cooking purposes. (App. pp. 132-133.)

There is some testimony in the record to the effect that some of the water was bad and that it was used upon one or two occasions for tea. The use of this water, which may have been tainted, when plenty of the best water obtainable was at the disposal of the men, was due no doubt to an error upon the part of the water-tender, who, upon discovering his mistake, made certain that it was not again used.

How this water became objectionable is explained by Ed Nelson. He testified:

> "Q. On the way down did you hear any complaint about the water being bad?
>
> A. I did; there was one particular cask that had been smashed in in handling it, and the head had been damaged; there was a big bang in the head, and it was possibly smashed in, and I suppose some iron water got in the cask and that stunk considerably; that was the only one. The others were not bad; they had lots of good water.
>
> Q. Was the water in the iron tank tainted at all?
>
> A. No, sir, the water in the iron tank was perfectly good.
>
> Q. How large were these casks?

A. Six of them or seven, held 90 or 92 gallons, and there was one that held 200 or 250, and the water-cask that lay on the schooner, that holds something like 150 or 160 gallons, and then there was some barrels we used for water-breakers on the launch, and those barrels held an extra 100 gallons, 50 gallons each; they was also full of water.

Q. Was there any time when you were compelled to drink or use tainted water on the voyage down?

A. No, sir, never; one morning I turned out and the water-tender was pumping water out of the cask, the smelling water, and I says, 'What do you use that water for; we have plenty of fresh water; you do not have to use it.' Instead of dumping that water out he dumps it in the barrel where the cook had his cooking water, and that is the water he made tea from, and that is when the complaint was made." (App. pp. 159-160.)

The fact that plenty of the best spring water was at all times at the disposal of the men stands out very strongly. John Englund said:

"Q. Were you compelled to use or drink the water on the way down that was bad; did you have any bad water?

A. No, sir.

Q. Did you notice the water was bad at any time?

A. No, sir, I did not notice it.

Q. Did you hear any complaint among the crew about the food or there being bad water, or that there was not enough of it?

A. No, sir." (App. pp. 174-175.)

Swanson, when asked as to what kind of water the men had to drink, said:

"They had good water to drink; some of the trip coming home they had good water to drink. I do not know all; I cannot say for sure if they had good

water to drink the whole trip, but they had for some part of the trip anyway." (App. p. 69.)

Antone Jansen, another of the libelants, testified:

"Q. The water in the big tank was all right?
A. Yes, sir.
Q. The water in the five barrels was all right?
A. And the one cask, the main tank was pretty good.
Q. That was the tank that was aft?
A. Yes, sir.
Q. Could anybody help themselves to get it?
A. Yes, sir.
Q. Anyone could help themselves to drink out of that barrel?
A. Yes, sir, they had a bucket there." (App. pp. 115-116.)

The attention of the court is especially called to the testimony of Captain Soland and the remarks of the trial court appearing on page 146 of the Apostles, as follows:

"Q. From the time that iron tank was put in her and the casks put on her, for what purpose was the water used which was carried?
A. Used for eating and drinking.
Q. Did you ever find the water in the iron tank or in the casks on deck to have been tainted at all, or was it good water?
A. It was good water.
The Court. It is conceded here that the water in the tank and casks was good water."

The water in the tanks and casks there referred to and conceded to be good was not wholly consumed on the voyage home. The uncontradicted evidence shows that upon the ship's arrival in this port there still was some of that good water in the iron tank.

Captain Soland said that there were 75 gallons of it in that tank upon the ship's arrival. (Soland, App. p. 148.)

It is of course true that Swanson attempted to explain the non-use of the best water by testifying that he was only permitted to take the water furnished him by the water-tender, but how lacking in truth and in fact is that explanation is best evidenced by the testimony of another of the libelants. Antone Jansen, when asked about this concededly good water, said:

> "Q. Could anybody help themselves to get it?
> A. Yes, sir.
> Q. Anyone could help themselves to drink out of that barrel?
> A. Yes, sir, they had a bucket there." (App. p. 116.)

It is unbelievable that with all of this pure water at the disposal of the men, water, according to the testimony, that any of them could have helped themselves to, they would persist in using the tainted water without making any form of complaint.

With these uncontradicted facts before us, it is difficult for us to understand how a finding that appellant failed to furnish sufficient water on fourteen and one-half days can be supported.

Potatoes:

The trial court found that the sum of twenty-nine dollars was due each libelant for the failure to provide potatoes. (App. p. 189.)

We admit that potatoes were not furnished to the men during the return voyage, but we do urge upon this court circumstances which, in our judgment, should

at least be taken into consideration by the court in fixing the penalty in this particular.

The statute, if applicable to this cause, required appellant to furnish a little less than 3,000 pounds of potatoes. At the commencement of the voyage appellant purchased 4,850 pounds—more than sufficient to last the whole voyage.

The appellant contends that all due care was used under the circumstances in supplying an excessive quantity of potatoes to take care of spoilage.

It appears that the potatoes were unavoidably injured, spoiled or lost, a common occurrence in Alaska. These facts should be taken into consideration, therefore, for the purpose of modifying or refusing compensation as the justice of the case required.

The trial court has seen fit to impose the maximum penalty, namely, one dollar a day for shortage of the potatoes, and it is submitted that such ruling, under the circumstances, is unjust.

Rice:

The trial court found that the sum of six dollars was due each libelant for the failure to provide rice. (App. p. 189.)

Rice, according to the statute, should have been served every Monday and Saturday—eight days on the return voyage. The statute also provides that hominy, oatmeal, cracked wheat, or tapioca, may be used as a substitute for rice.

The libel admits that rice was served on at least two days. The trial court, as before stated, found that there were six days on which appellant failed to provide rice.

The testimony of Captain Soland is uncontradicted that upon the ship's arrival here there was a large quantity of tapioca, sago, and pearl barley on board the vessel. (App. pp. 152, 153.) Tapioca, it will be remembered, is expressly made a substitute for rice.

Swanson, the cook, testified:

> "That tapioca I used for tapioca was some we had; that tapioca Mr. Nelson gave me I used that, * * * " (App. p. 97.)

It also appears that the captain of the "Roy Somers" gave the cook some tapioca besides that which was given him by Mr. Nelson.

Furthermore, the evidence is indisputable to the effect that a large amount, to wit, ninety sacks of oatmeal, were taken on board the vessel from Mittendorf's store just prior to the commencement of the return voyage.*

The testimony of Captain Soland is conclusive in this regard. It is as follows:

> "Q. Did you have any rolled oats or oatmeal aboard?
> A. We had oatmeal.
> Q. Did you run short of that on the last part of your trip on the way down?
> A. We had it every morning coming down."

Here, too, it is to be borne in mind that oatmeal is expressly made by the statute one of the substitutes for

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* See Mittendorf's invoices, original exhibits on file in this court.

rice. How, then, can it be said that rice, or a permitted substitute, was not served six times?

It is very significant to note that when Swanson, one of the libelants, prepared the list of provisions to be supplied by Mittendorf for the return voyage he did not ask for rice. The reason, however, is apparent; he had enough rice, tapioca and oatmeal to make a trip that would last several times as long as the period of time required to make the return voyage in question.

It is submitted that the District Court erred in holding that there was a failure to provide rice, or its substitutes, for it is beyond doubt that there were large quantities of rice, tapioca and oatmeal aboard the vessel for the use of the men. There is no doubt that rice was served at least part of the trip, and it is uncontradicted that oatmeal, a permitted substitute, was served every single day during the whole trip, and that tapioca was served some of the time during the return voyage, and that some of it was aboard the vessel upon her arrival at this port.

It is clear that the libel in this regard is utterly false and that the trial court erred in holding that there was a failure to provide rice or its substitutes.

Furthermore, there were other similar foodstuffs on board, such as sago and pearl barley, and while it is of course admitted that they are not specifically mentioned in the statute as substitutes for rice, the fact that they were on board nevertheless indicates that the appellant furnished large quantities of not only those provisions

required by the statute in question, but also that he furnished the vessel with plenty of wholesome provisions.

It must be apparent to this court that the statute relied upon by the libelants as to the quantity and kind of provisions to be provided was, with the exception of the potatoes, more than complied with.

Onions:

The trial court found that the sum of eight dollars was due each libelant for the failure to provide onions. (App. p. 189.)

Swanson, one of the libelants, testified:

> "I had two crates of Australian onions on leaving San Francisco." (App. p. 51.)

When asked how many onions he ordered when leaving Alaska, he replied:

> "Onions. I know we cannot get that up there, so I did not ask for that."

Captain Soland testified that upon the ship's arrival in this port he had about one dozen onions aboard the vessel. (App. p. 151.)

Then, too, it must be borne in mind that it is difficult to keep onions in Alaska during the whole fishing season. Great care must have been exercised with the onions, because the libelants themselves admit that onions were served with the hash on the return voyage (App. pp. 72, 114, 121), while the testimony that onions were aboard the vessel upon her arrival here is so conclusive upon the point as to whether or not onions were or were not served, that we think further discussion of the matter is unnecessary.

A reference to the invoices on file as original exhibits in this court fairly shows, however, that a large quantity of canned vegetables, such as corn, was supplied the vessel and actually used on the return voyage. Furthermore, the invoices of Dodge, Sweeney & Company show that large quantities of cabbages, carrots and turnips were supplied for the expedition. The statute did not require cabbages, carrots and turnips to be included in the list of provisions, or canned corn, or any other canned vegetables, yet the invoices unmistakably establish the fact that these articles were supplied in great abundance.

These facts conclusively show that the appellant used every endeavor not only to provide the class of provisions provided for by the statute relied upon, but also used every endeavor to provide other provisions for the men far more liberally than required by that statute.

Furthermore, the onions, as well as all of the provisions, were in the care and custody of Swanson, one of the libelants. Surely he would not want for onions when he knew they were on board. There is no evidence in the record of any order forbidding their use, and we submit that it is unreasonable to suppose that in the absence of such order he would voluntarily refrain from their use.

It is respectfully submitted that there should be no recovery because of the alleged failure to provide onions.

Beans:

The lower court found that the sum of two dollars was due each libelant for the failure to provide beans.

There were eight days, according to the statute, upon which beans should have been served. The invoices, on file as original exhibits, show that a large quantity of beans were supplied the "Roy Somers" before she started on her return voyage.

At the time these beans were furnished, Swanson, the cook, had one additional sack on board. (App. p. 58.) In fact, the cook had such a quantity of beans on board that he could not remember whether he had ordered more from Mittendorf's store. (App. p. 58.)

The Mittendorf invoice shows that one hundred pounds of beans were supplied just prior to the commencement of the return voyage. The statute required that one-third of a pint be served to each man twice a week. Two hundred and eight rations of one-third pint each were required for the return voyage. There are sixty pounds of beans in one bushel. One hundred pounds of beans, therefore, will provide three hundred and twenty rations of one-third pint each.

The beans obtained from Mittendorf just prior to the commencement of the return voyage were sufficient, therefore, to supply the needs of the men for forty-five days. The return voyage lasted only twenty-nine days. In short, fifty per cent more beans than required by the statute under consideration were furnishd by Mittendorf and actually used on the return voyage, but the

cook, a libelant, testified that at that time there was another sack of beans on board the vessel.

Swanson also testified that he gave the men beans twice a day, and not twice a week, as required by the statute. His testimony in that regard is so conclusive that it is here inserted.

> "How many times a day did you serve those beans, three times or two times?
> A. Twice a day." (App. p. 58.)

To explain the use of beans every day upon the return voyage, Swanson said:

> "A. I had to give them beans every day on the trip down when we do not have any potatoes." (App. p. 58.)

There is not a bit of testimony to contradict the statement that far more beans than required by the statute were provided for the return voyage. On the contrary, every bit of evidence clearly establishes the fact that an abundant quantity of beans was provided. It shows that beans were served not twice a week but twice a day upon almost every day of the voyage.

We are here reminded of another incident which to our mind clearly indicates how utterly unreliable is the testimony of the libelants.

In the face of all of the foregoing evidence upon the question of the beans served during the entire voyage, C. A. Nelson, when asked the direct question as to whether or not the beans were served during that period answered:

> "No, sir." (App. 104.)

This incident alone should make this court hesitate to accept the testimony of such witnesses, particularly so when, as in this case, they club together to avenge a personal feeling between some of them and the appellant.

It is also significant to note that, while the same provisions were served throughout the vessel, the libelants, only, are here suing, and it is to be borne in mind that, even in the case of the libelants, the ringleaders had to persuade the great majority to join in a complaint which was made for the first time after the ship's arrival in this port.

Pork:

The trial court found that the sum of six dollars was due each libelant for the failure to provide pork. (App. p. 189.)

The statute upon which libelants rely provides that upon this voyage pork should have been served on twelve days. The trial court found that there was a failure to provide pork on six days.

Swanson, one of the libelants, was asked how much salt pork he ordered from Mittendorf when preparing the list of provisions needed for the return voyage. He answered:

"I did not tell him any." (App. p. 57.)

Later he testified that he might have served a meal of salt pork coming here. (App. p. 70.)

Again he testified as follows:

"Q. You had two pigs still living at the time you got ready to come back?

A. We had two pigs. * * *

* * * * * * * *

Q. Did you weigh this pig?

A. No, sir, but I can take a guess—the last pig we killed weighed 200 pounds, something like that.

Q. That is, dressed?

A. Yes, sir.

Q. You killed that on the way down, didn't you?

A. We killed that up in Bering Sea when we were two or three days off.

Q. Off Koggiung or Unimak Pass?

A. Off Koggiung in Bristol Bay.

Q. You had fresh pork on board the vessel the first two or three days you were out?

A. Yes, sir.

Q. You had lots of pork on board that vessel, didn't you?

A. Yes, sir." (App. pp. 87-8.)

Captain Soland testified that they killed a pig two or three days before leaving Alaska and the other large pig was killed five or six days after the voyage began, and that when the return voyage began there still remained one-half of the first pig killed. (App. p. 149.)

Ed Nelson also testified that one pig was killed two days before leaving Alaska and that one-half of that pig remained at the commencement of the voyage. The first pig killed weighed 175 to 200 pounds. (App. p. 160.) Eighty-five or one hundred pounds of that pig was, therefore, aboard the vessel when the return voyage commenced. The second pig killed weighed 250 pounds dressed.

It is certain, therefore, that at least three hundred and fifty pounds of fresh pork were supplied and consumed as such, or salted and later consumed on the return voyage. We submit that there is no testimony to the contrary.

The appellant testified that when he left Alaska there were two pigs on the "Roy Somers," one that weighed 250 pounds and one that weighed about twenty-five pounds less. (App. p. 136.)

Carl Patsel, another of the libelants, when asked as to whether or not pork was served, said it was served

"For a few days." (App. p. 117.)

Again we have evidence of the unreliability of the evidence of these men. Axel Peterson, in the face of all the evidence upon pork, testified that he never saw any pork. (App. p. 120.)

As before pointed out, Swanson admitted that salt pork might have been served one day on the return voyage, leaving three hundred and fifty pounds of fresh pork, besides bacon, and a very large amount of corned beef, a great quantity of which remained over at the end of the return voyage, to supply the needs of twenty-six men for eleven days.

If fresh pork is served, which, according to the statute, is permitted, each man is entitled to receive one and one-half pounds. If salt pork is served, each man is entitled to one pound.

Most of the libelants admitted that fresh pork was served on two or three days, so that if we assume that fresh pork was served three days, according to the statute, only one hundred and seventeen pounds were required on board the ship. The fact is, however, that two hundred and thirty-three pounds of pork was salted and served to the men as salt pork.

It seems quite clear that, with two hundred and thirty-three pounds of salt pork on board the vessel four or five days after the "Roy Somers" commenced her voyage, the men must have been provided with the requisite amount of salt pork upon the remainder of the voyage. As testified to by Swanson, one of the libelants, there was lots of pork on board that vessel. (App. pp. 87-88.)

It is respectfully submitted that enough pork, both salt and fresh, was on board the vessel to more than comply with the terms of the statute relied upon, which fact conclusively indicates that the trial court erred in finding that there was a failure to provide pork on six days.

In concluding this portion of our argument we desire to emphasize that appellant, while in Alaska, instructed one of the libelants, Swanson, to obtain all necessary provisions for the return voyage. Swanson discussed the provisions with the master and prepared the list of necessary provisions. These provisions were under his control during the whole voyage and he could have prepared and served any of them that he might desire.

It seems highly improbable that he would refrain from using provisions that were undoubtedly on board the vessel. We say undoubtedly on board because it is conclusively established that as to some of them they were on board the vessel when she arrived in this port.

So, too, with the water. It is difficult to understand how Swanson would persist in using the worst water he could find when the best spring water obtainable,

water conceded to be the purest in Alaska, was aboard the ship, free to the use of all the men, as testified to by Antone Jansen, one of the libelants. (App. p. 115.)

It will be remembered that at least seventy-five gallons of this spring water was also aboard the vessel upon her arrival in San Francisco.

Furthermore, we desire to call the court's attention to the fact that this was not the voyage of a merchant ship in the ordinary sense, but was a fishing expedition, upon which the fishermen remained and were fed in Alaska by appellant for the entire fishing season of over four months.

In view of these facts, we feel that this court should correct the errors of the lower court here complained of.

THE APPELLEES WERE NOT SEAMEN.

The Act upon which the libelants below rested was formulated for the protection of seamen and to promote commerce. By its enactment it was intended that the American seaman should have the nourishment necessary to his particular mode of life, thereby enabling him to properly care for himself and to properly perform his work. By this means our merchant marine would prosper, with the result that our commerce would thereby be promoted.

A seaman, within the meaning of the statute, is one that is engaged as a "merchant seaman" at a seaman's wages. He is not one that shares in the profits of the cruise, or one that has his wages figured and dependent

upon the particular specie of salmon caught by him, as in the case of the libelants in this cause.*

In

Telles v. Lynde, 47 Fed. 912,

Judge Morrow, sitting in the District Court for the Northern District of California, held that one shipping on a voyage from this port to Behring Sea and return, to engage in work similar to that of the present appellees, was not a seaman, because he was to recover compensation for his services at the rate of twenty-five (25) dollars for each 1,000 fish caught by him.

These appellees, libelants below, were not seamen engaged in the merchant seamen service; they do not ply the seas for their livelihood; upon them does not depend the success of our merchant marine; they are treated, considered and recognized as fishermen, each of them belonging to the Alaska Fishermen's Union. (Swanson, App. p. 31.) Furthermore, the whole theory of their employment was to render services as fishermen at Bristol Bay, including the work about the shore in preserving the fish caught by them, as well as in placing the fish aboard the vessel.

In fact, one of them, Hugo Lundgren, signed up in the sole capacity of a salter. (See shipping articles.) How then can it be said that libelants are seamen?

Judge De Haven, in speaking of men engaged in work identical with that under consideration, said:

> "The contract, while it provides that libelants shall render some services as seamen, is not, strictly

* See shipping articles on file in this court as original exhibits.

> speaking, such a contract as is contemplated by Section 4552 of the Revised Statutes. That section, as originally enacted, was only intended to relate to merchant seamen (The Cornelia M. Kingsland (D. C.), 25 Fed. 856); and I do not think any of the acts amendatory thereof or supplemental thereto have extended its provisions to contracts like that set out in the libel."
>
> *Domenico v. Alaska Packers' Ass'n,* 112 Fed. 554, at p. 560.

It may be urged that there is as much necessity for the statute to be held applicable to all men aboard ship without regard as to whether or not they are seamen.

The answer to this suggestion, however, is that the statute in its nature is a penal one and should be strictly construed in this particular. Furthermore, as we shall later attempt to point out, Section 4564 of the Revised Statutes of the United States affords men other than seamen adequate protection and relief.

It is respectfully submitted that the court erred in holding each of the libelants to be a seaman within the meaning of the statutes relied upon by them.

THE "ROY SOMERS" WAS A FISHING VESSEL.

This vessel was not engaged in the merchant service. She proceeded to Alaska for the sole purpose of engaging in the fishing trade. She remained in those waters during the whole fishing season, and the men aboard of her were fishing for the benefit of the appellant. (App. pp. 40 and 75; P. M. Nelson, p. 133.)

A fishing vessel, by the express provisions of Section 26 of the Act of December 21, 1898, Vol. 3, U. S. Compiled Statutes, 1901, page 382, is expressly excluded from the provisions of Section 4612.

It is respectfully submitted, therefore, that the court below erred in not holding the "Roy Somers" to be a fishing vessel.

Section 4612 of the Revised Statutes is not applicable to vessels engaged in the Alaska fishing trade.

The appellees contend, and they were supported in their contention by the decree of the lower court, that the schedule annexed to Section 4612 of the Revised Statutes (Volume 3, Compiled Statutes, page 3122) is applicable to them. In so holding, we think the lower court erred.

Section 4612 of the Revised Statutes of the United States provides:

> "In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this Title may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

That section plainly says that it is applicable to any vessel to which the provisions of Title 53 on Merchant Seamen may be applicable.

We must, therefore, determine whether or not that statute is applicable to the vessel upon which libelants shipped by referring to the provisions of Title 53 on Merchant Seamen, Volume 3, Compiled Statutes, pages 3061 to 3125.

Chapter I of Title 53 provides for the appointment and duties of shipping commissioners.

The Act of June 9, 1874, Chapter 260 Vol. 3, Compiled Statutes, page 3064, provides that none of the provisions of Chapter I, which deals with shipping commissioners,

> " * * * shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

The foregoing Act was amended by the Act of June 19, 1886, Chapter 421, Vol. 3, Compiled Statutes, page 3064, so as to permit the signing by shipping commissioners of a crew in the coasting trade, provided the master so requested it.

But even though the master does request the shipping commissioners to sign up the crew in this trade, according to the Act of August 19, 1890, as amended in 1895 and 1897, Vol. 3, Compiled Statutes, page 365,

> "When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or Mexico, as authorized by Section 2 of an Act approved June nineteenth, eighteen hundred and eighty-six, entitled 'An Act to abolish certain fees for official services to American vessels, and to amend the laws relative to shipping commissioners, seamen, and owners of vessels, and for other purposes,' an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by Sections four thousand five hundred and eleven and four thousand five hundred and twelve of the Revised Statutes, *not, however, including the sixth* and eighth items of Section four thousand five hundred and eleven; and such agreement shall be posted as provided in Section four thousand five hundred and nineteen, * * *"

The sixth item of Section 4511 of the Revised Statutes, Vol. 3, Compiled Statutes, page 3069, there referred to is the scale of provisions to which appellees claim they are entitled.

In other words, whenever a crew is shipped in the coasting trade before a shipping commissioner, the shipping articles shall be the same as upon every other shipping agreement, with the exception that it is not necessary to make the scale, relied upon by appellees, a part of the shipping articles.

If, therefore, we are correct in our contention that the scale of provisions was inserted in the shipping articles in this case in direct violation of Section 4511 of the Revised Statutes, it follows that the penalties attached to the failure to provide the scale were erroneously imposed, in this case, upon appellant.

It may be urged that men engaged in the work of appellees would be without a remedy if the sixth item of Section 4511 of the Revised Statutes—the scale of provisions set forth in Section 4612 of the Revised Statutes—be held not applicable to them.

That such fear is groundless, however, is apparent when Section 4564 of the Revised Statutes is read. It provides:

> "Should any master or owner of any merchant vessel of the United States neglect to provide a sufficient quantity of stores to last for a voyage of ordinary duration to the port of destination, and in consequence of such neglect the crew are compelled to accept a reduced scale, such master or owner shall be liable to a penalty as provided in Section forty-five hundred and sixty-eight of the Revised Statutes."
>
> Vol. 3, Compiled Statutes, page 397.

It is apparent that Section 4564 of the Revised Statutes is not applicable to this case, for it is beyond all question that a sufficient quantity of good stores were provided to last the entire voyage.

It is therefore respectfully submitted that the court erred in holding that appellant was bound to furnish the scale of provisions set forth in Section 4612 of the Revised Statutes.

THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM PENALTY PER DAY FOR EACH ARTICLE OF FOOD NOT PROVIDED.

Section 4568 of the Revised Statutes, the statute here under discussion, in part provides:

"If, during a voyage, the allowance of any of the provisions which any seaman is entitled to under Section forty-six hundred and twelve of the Revised Statutes is reduced * * *, the seaman shall receive, by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages:

"First. If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding fifty cents a day.

"Second. If his allowance is reduced by more than one-third of such quantity, a sum not exceeding one dollar a day.

"Third. In respect of bad quality, a sum not exceeding one dollar a day.

"But if it is shown to the satisfaction of the court before which the case is tried that any provisions, the allowance of which has been reduced, could not be procured or supplied in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or refuse compensation, as the justice of the case may require."

The lower court in its opinion (App. p. 189) found that each of the libelants was entitled to receive the maximum penalty per day for each article of food found not to have been provided.

For instance, it found that there was a failure to provide rice (or any of its substitutes) upon six days. The libel alleges, and it is admitted by libelants, that rice was served on two days. (App. p. 7.) The statute only required rice to be served on eight days of the voyage. It therefore becomes evident that the court imposed

a penalty of one dollar per day for the failure to provide rice.

So with the water; the court found that it was not provided on fourteen and one-half days, and it therefore imposed a penalty of fourteen and 50/100 (14.50) dollars upon appellant.

If the lower court's theory be correct, it follows that the failure to provide more than one-third of each of the sixteen articles required to be served on each Sunday would result in a penalty of sixteen (16) dollars per day, or the allowance of sixteen (16) dollars per day to each man. We do not think the statute was intended to have such construction.

It is our contention that the proper construction of the Act is that the sum of not more than fifty cents a day for each man shall be allowed for a shortage of one-third or less of all the articles of food required to be served on any one day, and the sum of not more than one dollar per day for each man if the shortage of all the food upon any given day exceeds one-third of the amount specified.

The statute distinctly says:

> "If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding fifty cents a day."

It seems to us that that language was intended to mean and does mean that if the whole of a seaman's allowance—the whole of the amount to which he is entitled on each day—is reduced by any quantity not

exceeding one-third of the amount specified, he shall be entitled to a sum not exceeding fifty cents per day.

It is respectfully submitted that the penalty does not become due for each article of food that may be short.

CONCLUSION.

In conclusion, we submit that this is a cause in which some of the appellees are taking advantage of a statute, never intended for them, to avenge a bitter feeling against appellant.

It is a very simple matter for a number of men to join in a libel such as the one now before the court and testify to almost any statement of facts. A shipowner is at the mercy of such men. He can do no more than produce men aboard the ship other than those suing him, and they usually are few in number because the men seeking additional money are shrewd enough to realize that it is unsafe to proceed in such a cause unless they have the great majority join together.

It is also well to note that even in this cause all of the libelants were not called to the stand. The ring-leaders testified for all of them.

It is also significant to note that appellant produced every man aboard the vessel, other than the libelants, to testify in this cause.

In view of all of the facts here presented, we feel that the decree of the lower court is erroneous in the

particulars here complained of and it should therefore be reversed.

Dated, San Francisco,
October 27, 1915.

Respectfully submitted,

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Proctors for Appellant.